

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 GERALDINE BARABIN, as
11 Personal Representative for the Estate
12 of HENRY BARABIN, deceased,

13 Plaintiff,

14 v.

15 ASTENJOHNSON, INC., et al.,

Defendants.

CASE NO. C07-1454JLR

ORDER DENYING MOTION
FOR EXTENSION OF
DISCOVERY CUTOFF

16 **I. INTRODUCTION**

17 Before the court is Plaintiff Geraldine Barabin's motion to extend the discovery
18 cutoff date. (Mot. (Dkt. # 645).) Defendants Scapa Dryer Fabrics, Inc. ("Scapa") and
19 AstenJohnson Inc. ("AstenJohnson") opposes this extension. (Scapa Resp. (Dkt. # 646);
20 AstenJohnson Resp. (Dkt. # 647).) Having considered all submissions, the balance of the
21 record, and the applicable law, the court DENIES the motion.

22 //

II. BACKGROUND

On March 29, 2017, the court set a case schedule for this retrial, with the discovery cutoff for November 26, 2017, the dispositive motions deadline on December 22, 2017, and trial commencing on March 26, 2018. (3/29/17 Order (Dkt. # 643).) On September 15, 2017, Ms. Barabin disclosed to Defendant AstenJohnson and Scapa (collectively, “Defendants”) the witnesses she intended to call at the retrial, including an expert witness, Dr. Carl Brodtkin, whom she had called to testify in the original trial. (Mot. at 2; Good Decl. (Dkt. # 645-1) ¶¶ 3-4.) Defendants indicated on September 20, 2017, that they would like to depose all expert witnesses offered by Ms. Barabin. (Mot. at 2; Good Decl. ¶ 11.) On September 26, 2017, Ms. Barabin contacted Dr. Brodtkin to schedule a deposition but learned that Dr. Brodtkin was unavailable until December 19, 2017. (Mot. at 2; Good Decl. ¶ 16.) Because this date falls after the discovery deadline of November 26, 2017, Ms. Barabin filed the instant motion for extension of the discovery deadline. (*See generally* Mot.)

III. ANALYSIS

Ms. Barabin argues that an extension is warranted because Dr. Brodtkin’s preexisting commitments and unavailability constitute the good cause required by Federal Rule of Civil Procedure 16(b)(4) to modify the case schedule.¹ (Mot. at 3); *see* Fed. R. Civ. P. 16(b)(4). Scapa and AstenJohnson respond that Ms. Barabin has not shown that

¹ Upon reply, Ms. Barabin raises Federal Rule of Civil Procedure 60(b)(1). (Reply (Dkt. # 648) at 3-5.) This rule was not raised in Ms. Barabin’s motion (*see* Mot.), and thus, the court will not consider this new argument raised only in reply, *see Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007).

1 Dr. Brodkin's unavailability was unforeseeable, nor has Ms. Barabin shown that she was
2 diligent in ascertaining Dr. Brodkin's availability. (Resp. at 2.)

3 A case schedule may be modified only for good cause and with the judge's
4 consent. Fed. R. Civ. P. 16(b)(4). Rule 16's "good cause" standard primarily considers
5 the diligence of the party seeking the extension, and a case schedule will only be
6 modified "if it cannot reasonably be met despite the diligence of the party seeking the
7 extension." Fed. R. Civ. P. 16 advisory committee notes (1983 amendment). The focus
8 of this inquiry is on the moving party's reasons for seeking modification. *Johnson v.*
9 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). "If that party was not
10 diligent, the inquiry should end." *Id.* "[C]arelessness is not compatible with a finding of
11 diligence and offers no reason for a grant of relief." *Id.*

12 Here, Ms. Barabin has not shown diligence. In the first trial, Dr. Brodkin was both
13 deposed by Defendants and called as a witness; indeed, Ms. Barabin concedes that she
14 understood Dr. Brodkin to be "imperative" for the retrial. (Mot. at 2.) Ms. Barabin thus
15 knew, for the last few years since the case was remanded for retrial, that Dr. Brodkin
16 would need to be made available. Moreover, she knew for the last six months that the
17 discovery deadline would be in November of this year. (See 3/29/17 Order.) And yet,
18 Ms. Barabin did not ascertain Dr. Brodkin's availability until the end of September. (See
19 Good Decl. ¶¶ 15-16.) Dr. Brodkin's unavailability now does not render Ms. Barabin's
20 efforts—or lack thereof for the many preceding months—diligent. Because Ms. Barabin
21 was not diligent in adhering to the trial schedule, the court denies her request for an
22 extension of the discovery deadline. See *Johnson*, 975 F.2d at 609.

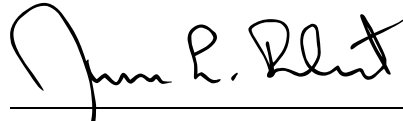
1 Although the court need not consider the existence or degree of prejudice to
2 Defendants, *see id.*, the court observes that pushing the discovery deadline to December
3 20, 2017, as requested by Ms. Barabin would run into the dispositive motions deadline on
4 December 22, 2017. As Defendants state, drafting a *Daubert* motion to address Dr.
5 Brodkin's testimony, or incorporating Dr. Brodkin's testimony in a motion for summary
6 judgment, would be "impossible" in just two or three days. (Resp. at 2.)

7 Because Ms. Barabin has not established the required showing of diligence, and
8 because an extension of the discovery deadline would affect the remainder of the trial
9 schedule, the court denies Ms. Barabin's motion for an extension.²

10 IV. CONCLUSION

11 The court DENIES Ms. Barabin's motion for an extension of the discovery cutoff
12 date (Dkt. # 645).

13 Dated this 20th day of October, 2017.

14
15 
16 JAMES L. ROBART
United States District Judge

17
18
19
20
21
22

² The court's denial of Ms. Barabin's motion for an extension is not in any way a
determination of whether Dr. Brodkin's testimony would be excluded from the retrial.